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Supreme Court, U.S.

041234 MAR 11 2005

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

Renee S. Thurlow,

Petitioner,

v.

United States of America, et al.

Respondents.

On Petition For Writ of Certiorari
To The United States Court Of Appeals For The Sixth Circuit

APPENDIX

Sixth Circuit Court of Appeals
Judge Nelson
Judge Batchelder
Judge Collier (DJ)

Renee S. Thurlow
Petitioner pro se
53075 Barberry Circle
Chesterfield, MI 48051
(586) 749-4942

APPENDIX

As required by Rule 14.1(i), attached hereto are the relevant District and Appeals Court opinions, orders, findings of fact and conclusions of law entered in conjunction with the December 13, 2004 judgment be sought review by petition to this Court and reproduced verbatim.[1]

[1] There was no Appellate Court transcript produced as the Court did not allow Petitioner according to her previous Counsel of Record oral argument. There are no cited unpublished opinions in the Petition.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DISTRICT

RENEE THURLOW, Personal Representative of the Estate of Justin Haase, deceased,

Plaintiff,

-v-

Case Number: 03-72865

UNITED STATES OF AMERICA, THE DEPARTMENT OF THE NAVY, SERGEANT WILLIAM R. BILENSKI, SERGEANT DWAYNE A. HARDWICK, HOSPTIALMAN SEAN O. AUDAIN, and LIEUTENANT COMMANDER LLOYD D. WEDDINGTON,

Defendants.

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DEFENDANT'S (sic) MOTION TO DISMISS
BEFORE THE HONORABLE BERNARD A. FRIEDMAN
United States District Judge
238 U.S. Courthouse & Federal Building
231 Lafayette Boulevard West
Detroit, Michigan 48226
WEDNESDAY, DECEMBER 17TH 2003

APPEARANCES:

For the Plaintiff:	Leroy Wulfmeier, III, Esq.
For the Defendant:	Elizabeth J. Larin, Assistant
Court Reporter:	Joan L. Morgan, CSR Official Court Reporter

DEFENDANT'S (sic) MOTION TO DISMISS
WEDNESDAY, DECEMBER 17TH 2003

Detroit, Michigan
Wednesday, December 17th, 2003

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THE CLERK: Recalling 03-72865, Rene (sic) Thurlow 6 versus United States of America.

THE COURT: May we have appearances, please?

MS. LARIN: Elizabeth Larin, appearing on behalf of the United States.

THE COURT: How are you?

MR. WULFMEIER: Leroy Wulfmeier, your Honor, on behalf of Renee Thurlow.

THE COURT: How are you?

MR. WULFMEIER: Good.

MR. COURT: Okay. This is Defendant's (sic) Motion.

MS. LARIN: Yes, Judge, this is our Motion to Dismiss this case under the Feres doctrine. I don't really -- we've really briefed this thoroughly. This is a classic Feres case.

THE COURT: It's really a sad case.

MS. LARIN: Very.

THE COURT: Counsel, anything you want to add, or anything? I mean --

MR. WULFMEIER: Well, I -- yes, I would like to ask this Court to overturn Feres. I know it's a difficult and unique situation. Feres has been around for fifty years, but that does not mean that it is anything but I believe to be judicial interpretation, judicial legislation. We have briefed it extensively. I think that while the Court apparently has its ruling --

THE COURT: No, I just have my notes. But I agree with you, this is one of those equitable cases. If I had equity jurisdiction, it screams, it screams and screams. It's not fair. There's is no question about that. Probably Ms. Larin would say the same thing, but she can't she's on the record.

MS. LARIN: I hope you're not asking --

THE COURT: No, I'm not asking, but I'm sure in your heart, but anybody who reads the facts in this particular case -- it's a horrible set of facts.

To be honest with you, one of my law clerks who really worked on it initially, the other is sitting right in front of me, she came to me and said oh, man, you know. And we looked at everything, I'll tell you. This is one we said there must be some case out there that will allow me. I'm not going to overrule the Supreme Court, I'll tell you right now. But we kept looking, and kept searching trying to find something, something that I could hang my hat on. I mean it's just so egregious, there's no question about that.

I mean, with so many cases that you could go on and on and on for fifty years, you know, you're absolutely right. And every time it gets interpreted by a Court of competent

jurisdiction on an appellate level it keeps slicing a little more, you know, away from the military person's rights to do something including when we finally get down to it, this such as this -- not sure as these things, but I mean there's several cases right on point --

MR. WULFMEIER: There are no rights at this point.

THE COURT: None.

MR. WULFMEIER: Even though it was under the Federal Tort Claims Act, specifically it indicates that there are rights.

THE COURT: But as I say for the last fifty years it's been interpreted and its keeps getting stronger --

MR. WULFMEIER: My point being that I believe that at the inception it was interpreted incorrectly.

THE COURT: It may have, but it's been re-interpreted so many times including by the United States Supreme Court that I would be very hard press to do it.

And I agree with you. As I say, we really looked at this case, and we sat down and -- Greta came in and said, there's got to be -- she just got out of law school. She said this is unfair, we've got to do something.

I tell you if there was any way to hang my hat on something, I would have. In fact, I event told Greta, I said maybe I'm going to put a little pressure on Ms. Larin to -- if we can find any loophole whatsoever, I'll put some pressure on her to go back to her client and maybe even settle this case or do something, just a little something,

some satisfaction. We couldn't find a loophole; otherwise, I would have had her at sidebar --

MR. WULFMEIER: You could start a new precedent today. Instead of Feres we could have Haase, your Honor, a new case.

THE COURT: I wish I could. As I say, I took an oath, and the oath was to follow the law.

Unfortunately the Supreme Court -- if it was, you know, another circuit or something like that, it would be real easy to do it.

I understand why they couldn't give him a stripe because he hadn't finished basic.

I'm not sure, did they pay his funeral expenses?

MS. LARIN: Judge, I don't know.

THE COURT: I saw something in there that indicated that they --

MS. LARIN: I would think that they paid it.

THE COURT: Did they pay it?

MR. WULFMEIER: Yes.

THE COURT: Oh, I thought I saw -- I knew they didn't give him a stripe but I thought there was something in there that said that they --

MR. WULFMEIER: There were so many other egregious acts.

THE COURT: I can't disagree with you.

There's not much I can do so I have to grant the Government's Motion.

MR. WULFMEIER: Thank you.

MS. LARIN: Thank you.

MS. LARIN: Shall I prepare an order?

THE COURT: No, we'll do it.

MS. LARIN: All right.

Thanks.

MR. WULFMEIER: Thanks.

THE COURT: Happy holidays to the both of you.

MR. WULFMEIER: Thank you, you too.

MS. LARIN: Thank you, Judge.

(Proceedings concluded.)

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DEFENDANT'S (sic) MOTION TO DISMISS
WEDNESDAY, DECEMBER 17TH 2003

CERTIFICATE

I, **JOAN L. MORGAN**, Official Court Reporter for the United States District Court for the Eastern District of Michigan, appointed pursuant to the provisions of Title 28, United State Code, Section 753, do hereby certify that the forgoing proceedings were had in the within entitled and number cause of the date hereinbefore set forth; (sic) and I do further certify that the foregoing transcript has been prepared by me or under my direction.

s/ Joan L. Morgan
JOAN L. MORAN,CSR
Official Court Reporter
Detroit, Michigan 48226

Date: Feb 20, 2004

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DISTRICT

RENEE THURLOW,

CLOSED 18 DEC 2003

Plaintiff,

vs.

Civil Action No.
03-CV-72865-DT
HON. BERNARD A.
FRIEDMAN

UNITED STATES OF AMERICA, et al.,

Defendants.

Filed '03 DEC 10 A11:17
U.S. DIST. COURT
CLERK EAST DIST.
MICH DETROIT-PSG

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ORDER GRANTING DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION

On December 17, 2003, this matter came before the court on defendants' motion to dismiss plaintiff's complaint. A hearing was held and oral argument heard. For the reasons stated on the record,

IT IS ORDER that the complaint is dismissed based on the court's lack of jurisdiction.

"s/ Bernard A. Friedman"
UNITED STATES DISTRICT JUDGE

Dated: DEC 18 2003
Detroit, Michigan

No. 04-1095

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RENEE THURLOW, Personal Representative of the Estate of Justin Haase, deceased,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; DEPARTMENT OF THE NAVY; SERGEANT WILLIAM R. BILENSKI; SERGEANT DWAYNE A. HARDWICK: HOSPTIALMAN SEAN O. AUDAIN; LIEUTENANT COMMANDER LLOYD D. WEDDINGTON,

Defendants-Appellees.

FILED DEC 13 2004
LEONARD GREEN, CLERK

O R D E R

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Before: NELSON and BATCHELDER, Circuit Judges; COLLIER, District Judge.*

Renee Thurlow, a citizens of Michigan, appeals through counsel, on behalf of her son Justin Haase's estate, a district court order dismissing her complaint field pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671 et seq., and 42 U.S.C. § 1983. Counsel did not respond to a

* The Honorable Curtis L. Collier, Untied States District Judge for the Eastern District of Tennessee, sitting by designation.

request to show cause why oral argument would be necessary in this case, and this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 43(a).

Mrs. Thurlow field this action to recover damages due to her son's death. According to the complaint, Justin Haase reported to Marine basic training in October 2001 at the age of eighteen. He was allergic to penicillin, and never received an alternate prophylactic course of antibiotics as required at his admission. Under the stress of basic training, including inadequate nutrition and rest, he developed a sinus infection which later developed into bacterial meningitis. His condition was not diagnosed or treated. Even after he was finally sent to a military hospital in December, the failure to properly diagnose and treat his condition continued, resulting in his untimely demise. Mrs. Thurlow sought relief under the FTCA § 1983.

Defendants moved to dismiss, arguing that the district court lacked jurisdiction under *Feres v. United States*, 340 U.S. 135 (1950), which prevents members of the military from recovering damages under the FTCA. Mrs. Thurlow field a response, and the district court heard the oral argument on the motion, which it reluctantly granted.

On appeal, Mrs. Thurlow argues that *Feres* was wrongly decided and should be overturned as unconstitutional. Alternatively, she argues that *Feres* should not be applied in this case because her son was not yet technically on active duty, not having completed basic training.

We review de novo a dismissal for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), *Skees v. Untied States*, 107 F.3d.421, 422-23 (6th Cir. 1997).

Such review shows that the district court correctly dismissed this complaint pursuant to existing law.

There *Feres* doctrine has been held to bar claims by service members and their families for medical malpractice. *Irvin v. United States*, 845 F.2d 126, 130 (6th Cir. 1998). Mr. Thurlow argues the Feres doctrine was wrongly decided and is unconstitutional, relying on the dissenting opinion in *United States v. Johnson*, 481 U.S. 681, 692-703 (1987). However, this court cannot overrule a Supreme Court precedent. Mackey v. United States, 226 F.3d 773, 777 (6th Cir. 2000).

Mrs. Thurlow's attempt to distinguish *Feres* also lacks merit because malpractice claims arising from pre-induction medical examinations have been held barred under the doctrine. *Schoemer v. United States*, 59 F.3d 26, 29-30 (5th Cir. 2000).

Finally, Mrs. Thurlow's attempt to circumvent the *Feres* holding by invoking § 1983 fails, because the federal government and its employees are not subject to suit under § 1983. *Ana Leon T. v. Fed. Reserve Bank*, 823 F.2d 928, 931 (6th Cir. 1987). Moreover, Mrs. Thurlow has not pursued her § 1983 claim on appeal.

For the above reasons, the district court order dismissing this complaint is affirmed.

ENTERED BY ORDER OF THE COURT

s/Leonard Green
Clerk